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No. 00-832, 00-843

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* UNITED TELECOM COUNCIL AND EDISON ELECTRIC INSTITUTE IN SUPPORT OF RESPONDENTS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the provisions of the Pole Attachments Act apply to attachments by cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

2. Whether those provisions of the Pole Attachments Act apply to attachments by providers of wireless telecommunications services no less than to attachments by providers of wireline telecommunications services.

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UNITED TELECOM COUNCIL
AND
EDISON ELECTRIC INSTITUTE
IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT [1]

The United Telecom Council ("UTC") and the Edison Electric Institute ("EEI") respectfully submit this brief as amici curiae, pursuant to Rule 37 of the Rules of this Court, in support of Respondents.

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[1] In accordance with this Court's Rule 37.6, UTC and EEI respectfully state that this brief was authored entirely by counsel for the named *amici curiae* identified on the cover and signature pages hereof, and that no person or entity not identified as a party to this brief made a monetary contribution to the preparation or submission of the brief. In accordance with this Court's Rule 37.3(a), this brief is accompanied by the written consent of all the parties.

INTEREST OF UTC AND EEI

UTC and EEI are trade associations, whose members include utilities that are required by Section 224 of the Communications Act of 1934 to provide nondiscriminatory access for telecommunications providers and cable television systems for pole attachments, as defined by Section 224(a)(4). UTC and EEI have participated from the beginning in the proceedings that ultimately led to the present appeal. They have also participated in other administrative proceedings and judicial actions concerning the federal regulation of pole attachments. As such, UTC and EEI are pleased to provide the perspective of the industry concerning the two questions that are currently before the Court in this matter. The participation of UTC and EEI as amici curiae will be helpful to the Court to provide the perspective of the electric and other power utility industry concerning pole attachment regulations and to provide further information concerning pole attachments and industry practices and trends.

The United Telecom Council is the trade association for the telecommunications and information technology interests of electric, gas, water and steam utilities, pipeline companies and other critical infrastructure industries worldwide. The members of UTC include investor-owned, municipal and cooperatively-organized utilities. UTC seeks to provide a favorable business, regulatory and technological environment for companies that own, manage or provide critical infrastructure telecommunications systems in support of their core businesses.

The Edison Electric Institute is the association of the United States investor-owned electric utilities and industry associates worldwide. Its U.S. members are in 49 states and the District of Columbia, and serve over 90 percent of all customers served by the shareholder segment of the U.S. industry. EEI frequently represents its U.S. members before

Federal agencies, courts, and Congress in matters of common concern.

FACTUAL BACKGROUND

UTC and EEI stress to the Court that the statute is clear. Congress did not grant an unlimited right of access to utility poles, ducts, conduits and rights-of-way, in particular for the attachment of wireless telecommunications equipment and cable television equipment used to provide Internet access. Instead, Congress quite specifically granted only a limited right for attachments either used solely to provide cable television service, or to provide telecommunications services by wire. Granting a broader right of access than intended by Congress is not permitted, would unjustifiably expand federal jurisdiction over facilities regulated by the states, and would increase costs that must be borne by electricity customers. For these reasons, the Eleventh Circuit decision is entirely proper.

Congress knew that electric utilities are heavily regulated by the states and the federal government. In particular, the states have primary jurisdiction over the utility facilities at issue in this case. Congress recognized that the Federal Communications Commission ("FCC") had no expertise in regulating utilities or utility infrastructure. Therefore, Congress gave the FCC jurisdiction over utility infrastructure only to the absolute minimum extent necessary to accomplish the express, limited purposes of the statute.

The majority of what are commonly referred to as "telephone poles" are actually owned by electric utilities, and under the regulatory jurisdiction of the states as retail "distribution" facility.[2] While some of those poles are in fact

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[2] Comparison of the "Equivalent Number of Poles" reported by the Regional Bell Operating Companies ("RBOCs") in 2000 and the total overhead pole-miles of distribution line reported by the Utility Data Institute ("UDI") in 2000 for U.S. investor-owned utilities ("IOUs"). *See* ARMIS Data Retrieval System, 43-08: Table 1a. Outside Plant Statistics-

used by telephone companies (especially incumbent local exchange carriers, or "ILECs"), the ownership is most often solely or primarily in the hands of electric utilities.[3] Further, it is the understanding of the electric utility industry that attaching entities are becoming more reliant on utilities for pole infrastructure.[4] Electric utilities must control their poles in order to ensure the safe and reliable delivery of electric service to the public, as required by state law,[5] as well as the National Electric Safety Code.[6] In addition, it is the general

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Cable and Wire Facilities at http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ccb/armis1/forms/43-08/frame1a.hts, visited May 30, 2001. *See also* Utility Data Institute, McGraw-Hill Energy Directory of Electric Power Producers and Distributors (108th ed. 2000). According to the UDI, there were 17,956,500.68 distribution line pole-miles reported by IOUs. Based on a weighted average number of 28.5 poles per mile, IOUs own approximately 511,760,269 distribution poles. RBOCs reported only 17,624,190 "equivalent" poles.

[3] Based on an informal survey by EEI of its investor-owned utility members in 2001. The survey indicated that utilities own between 63% and 74% of the poles that are, or are likely to be used for pole attachments.

[4] *Id., compare* S. Rep. No. 95-580 at 13, *reprinted in* 1978 U.S.C.C.A.N. at 121 (finding that "[o]f the more than 10 million poles on which cable operators lease space, fewer than half are controlled by telephone companies, while 53 percent are controlled by power utilities, public and private.") Compare to the current figure in Note 3, above.

[5] *See e.g.* Mich. Comp. Laws Ann. § 46.10p(5)-(8)(West 2001); N.J. Stat. Ann. § 48:2-23 (West 2001); Ohio Rev. Code Ann. § 4928.10 (Anderson 2001); Or. Rev. Stat. § 757.649(2) (1999); Tex. Util. Code Ann. § 38005(a) (West 2000).

[6] The National Electrical Safety Code(R) ("*NESC*"), published by the Institute of Electrical and Electronics Engineers, Inc. adopts certain standards that cover basic provisions for safeguarding persons from hazards arising from the installation, operation, or maintenance of certain overhead and underground electric supply and communication lines. *NESC*, 1997 Edition (published August 1, 1996) Abstract and § 1, p. 1. Although the *NESC* is a voluntary standard, portions have been adopted,

practice of the industry that revenues generated from pole attachments are rolled-back to the ratepayers in the form of rate reductions in the cost of pole plant.

Most investor-owned utilities have not entered the retail telecommunications marketplace; those that offer telecommunications are becoming carrier's carriers that do not compete directly with cable or telecommunications service providers.[7] Moreover, as carrier's carriers, utilities facilitate the end-customer communications services of other carriers.[8] Therefore, electric utilities welcome the opportunity to provide pole attachments in order to facilitate the delivery of such services. However, regulated access and rates for cable modem or wireless telecommunications services are neither necessary under nor required by Section 224.

COUNTERSTATEMENT OF THE CASE

UTC and EEI adopt the statement of the case set out in Respondents' Brief and offer the following supplemental points in support of the argument that follows.

1. In 1978, Congress gave the FCC regulatory oversight only of the arrangements between utilities and community antenna television ("CATV") systems. S. Rep. No. 95-580,

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with or without changes, by some state and local jurisdictional authorities. *NESC*, p. vi.

[7] *Investor Owned Utilities with Telecommunications Subsidiaries*, UT Digest At-A-Glance (Pike and Fisher, Inc.), Apr. 2001 at 2-12. (reporting that only 55 of the approximately 200 North American investor-owned utilities are currently offering or are developing telecommunications services.)

[8] *See e.g. In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, 18086-87 (1998) (rejecting argument that carrier's carrier that also provided service to end users would discriminate against unaffiliated carriers seeking capacity).

95th Cong., 1st Sess., at 15, *reprinted in* 1978 U.S.C.C.A.N. 109, 123 ("1977 Senate Report"). The agency was not authorized to prescribe rates, terms and conditions for CATV systems generally. *Id.* Instead, the "basic design" of the 1978 Act was meant to be accomplished in "the most direct and least intrusive manner." *Id.* As such, Congress emphasized that, among other things, the FCC would not "regulate access and charges for . . . rents for antenna sites." S. Rep. No. 95-580 at 16, *reprinted in* 1978 U.S.C.C.A.N. at 124. Moreover, "the term 'pole attachment' [was] defined to mean the attachment *of cables* of a CATV system to a pole or occupation of a duct or conduit or other right-of-way owned or controlled by a utility." S. Rep. No. 95-580 at 26, *reprinted in* 1978 U.S.C.C.A.N. at 134 (emphasis added). The FCC's authority was "strictly circumscribed", S. Rep. No. 95-580 at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123, and jurisdiction extended "only so far as is necessary" over a "utility", as defined at Section 224(a)(1), that "owns or controls poles, ducts, conduits or rights-of-way, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1) (Supp. II 1996).

2. In 1993, the United States Court of Appeals for the District of Columbia Circuit found that Section 224 reasonably could be interpreted to apply to attachments that a cable television system used to provide commingled video and non-video communications. *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993). It stated that "[t]he basic issue in this case boils down to what Congress meant by the phrase "cable television system." *Id.* at 929. The court agreed with the FCC that Section 224 applied to "any attachment by a cable television system," which was not confined by the definition of a "cable system" that applied only "for purposes of [the Cable Act of 1984]", rather than for purposes of Section 224. *Id.* at 931. Thus, the Court concluded that the Pole Attachment Act of 1978 was

ambiguous and upheld the FCC interpretation of a "cable television system" as reasonable.

3. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 ("1996 Act"), was the first major overhaul of the Communications Act of 1934, 47 U.S.C. § 151 *et. seq.* ("Communications Act"), and significantly changed the nature of Section 224 by legislating a right of access and separate rates for attachments that are used by a cable television system to provide solely cable service, and those that are used by a non-ILEC telecommunications carrier to provide telecommunications service. Sections 703(d)(3) and (e)(1) of the 1996 Act (codified at 47 U.S.C. §§224(d)(3) and (e)(1)); *See also Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (1999) ("*Gulf Power I*") ("The Act's mandatory access provision, 47 U.S.C. § 224(f), effects a taking of a utility's property").

The 1996 Act explicitly made the definitions of "cable services" and "cable system" in Section 602 applicable to other provisions in the Act. Sections 3(36)–(37) of the 1996 Act (codified at 47 U.S.C. 153(6)-(7)). Section 602 defines cable service as:

> (A) the one way transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

Section 602(6) of the Communications Act (codified at 47 U.S.C. § 522(6)). A cable system is defined in relevant part as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service

> which includes video programming and which is provided to multiple subscribers within a community.

Section 602(7) of the Communications Act (codified at 47 U.S.C. § 522(7)).

The 1996 Act also created a definition for the terms "telecommunication service" and "telecommunications carrier." Telecommunications service was defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Section 3(48) of the 1996 Act (codified at 47 U.S.C. § 153(46)). A telecommunications carrier was defined in relevant part as "any provider of telecommunications services." Section 3(49) of the 1996 Act (codified at 47 U.S.C. § 153(44)). For purposes of Section 224, the term "telecommunications carrier" does not include any incumbent local exchange carrier ("ILEC") as defined in section 251(h). 47 U.S.C. § 224(a)(5).

Finally, the 1996 Act created a definition for "information services," as the

> offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications service.

Section 3(41) of the 1996 Act (codified at 47 U.S.C. § 153(20)). The FCC has declared that Internet services are "appropriately classed as information, rather than telecommunications, services," noting that "the functions and services associated with Internet access were classed as information services under the modified final judgment," and that "the Commission has consistently classed such services as electronic mail and voice mail as enhanced services," prior

to the 1996 Act. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536-57 (1998) ("*Universal Service Report to Congress*").

4. In 1998, the FCC promulgated rules implementing the 1996 Act amendments to Section 224. *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777 (1998) (codified at 47 C.F.R. §§ 1.1401—1.1418 (1999)) ("Report and Order"). The FCC interpreted section 224(f) (added by the 1996 Act) to require that utility companies provide pole attachments to cable television systems for Internet services at the prevailing rate for attachments used to provide solely cable service. *Id.* at 6795-96. It also interpreted the language of section 224(a)(4), which states that pole attachment meant *any* attachment by a telecommunications carrier, to mean that utilities must provide pole attachments for wireless communications equipment. *Id.* at 6798-99.

5. In 2000, the United States Court of Appeals for the Eleventh Circuit rejected the FCC's interpretation of the 1996 Act amendments pertaining to attachments used to provide Internet services and attachments for wireless communications equipment. It recognized that Section 224 "emphasizes the type of service [instead of] the type of entity acquiring the attachment," as a result of the 1996 Act amendments, and that the basis for regulating attachments for Internet services that was enunciated first in *Texas Utilities Electric Co.* no longer applied. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277 n. 32 (11th Cir. 2000) ("*Gulf Power II*"). It also recognized that the jurisdictional nexus "for any wire communications" did not reach attachments for wireless communications equipment. *Id.* at 1273-74. It concluded that regulating wireless attachments would be contrary to the underlying purpose of Section 224, "to prevent the telephone and power companies from charging monopoly rents to

connect to their bottleneck facilities." The Court reasoned that "[utility] poles are not bottleneck facilities for wireless carriers," because wireless "equipment can be placed on any tall building, and the whole set-up requires more physical space then [sic] a wireline system." *Id.* at 1275.

SUMMARY OF THE ARGUMENT

Section 224 is an expressly limited, exceptional and independent provision within the Communications Act that grants the FCC narrowly circumscribed jurisdiction over utilities for pole attachments used to provide either television-only cable service, or telecommunications service by wire. Within its express terms, only certain utilities that own or control poles, ducts, conduit and rights-of-way used for *wire* communications must provide pole attachments, and then only to purely cable television systems or telecommunications carriers other than ILECs that provide telecommunications services by wire. The FCC must adjudicate pole attachment complaints to ensure that pole attachment rates, terms and conditions are just and reasonable, but it is not authorized to prescribe specific rates. C*f.* Section 201(b) of the Communications Act (codified at 47 U.S.C. § 201(b)). Instead, Section 224 itself sets the range of rates that are just and reasonable for either cable television or telecommunications attachments. 47 U.S.C. §§ 224(d)-(e).

Congress sought to regulate pole attachments in the "least intrusive manner." S. Rep. No. 95-580 at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123. Jurisdiction was established only to the extent that utilities had *voluntarily* negotiated to provide space on the pole for wire communications. At that time, Congress expressly clarified that Section 224 did not authorize the FCC to regulate matters such as antenna siting, and had drafted Section 224(a)(4) to define pole attachments as any attachment "*for wire communication.*" H.R. Rep. No. 94-1630 at 30-3; and H.R. Rep. No. 95-721 at 10 (emphasis

added). The definition of pole attachments was only later changed to any attachment "*by a cable television system*" in order to narrow the class of entities that could benefit, not to imply that Section 224 applied to wireless attachments. *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d at 931.

Even when Congress amended Section 224 to provide for telecommunications carriers, it stipulated that regulated access and rates would only apply to the extent that pole attachments were either used by a cable television system solely to provide cable service, or used by a non-ILEC telecommunications carrier to provide telecommunications services. Thus after 1996, Section 224 emphasizes the services provided rather than service providers. *See Gulf Power II*, 208 F.3d at 1277.

Congress referred to the two types of entities separately, and carefully referred to the services they might provide as separate and distinct from the entities that might provide them. The language Congress used does not imply that cable operators could not provide telecommunications services, or that telecommunications carriers could not provide cable services, but the plain language restricts the benefits available to such "cross-service" providers. In fact, the only manner in which Congress intended to focus on entities rather than services was when it excluded ILECs from coverage under the pole attachment provisions. This is important, because it removed the ambiguity concerning the term "cable television system" which prompted the D.C. Circuit to uphold the FCC's view that Section 224 applies to attachments used to provide data transport. *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d at 929.

Thus, the Eleventh Circuit correctly concluded that the FCC "disregard[s] the unambiguous language of the 1996 Act" when the FCC argues that Section 224(d) or Section 224(b)(1) applies to the rate for cable modem service. *Gulf Power II*, 208 F.3d at 1276. As a result of the 1996 Act

amendments, Section 224 requires that attachments be used by a cable television system solely to provide cable service or by a telecommunications carrier to provide telecommunications services. Cable modem service is certainly not cable service and should be classed as an information service, rather than a telecommunications service.

Cable modem service is not solely cable service, because it does not fit the statutory definition within Section 602(6) that was made applicable to Section 224 by the 1996 Act. Even the FCC has concluded that cable modem does not provide video programming within the meaning of Section 602(6). *In re Internet Ventures, Inc.*, Memorandum Opinion and Order, File No. CSR-5407-L, 15 F.C.C. Rcd 3247, at ¶ 13 (Feb. 18, 2000). Nor, as the Eleventh Circuit noted, does it appear that cable modem service could be construed as the "use of" other programming service. *Gulf Power II*, 208 F.3d at 1276, *citing* 47 U.S.C. §522(6)(B).

Congress also did not intend that cable modem service be included within the definition of telecommunications service. When Congress amended Section 224 to include pole attachments by telecommunications service providers, it was aware of the distinction between basic and enhanced services that the FCC had followed since 1966. *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC2d 11 (1966); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC2d 384 (1980); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC2d 958 (1986). The FCC itself recognized that the definitions of telecommunications service and information services that were added by the 1996 Act correspond to the categories of basic and enhanced services,

respectively. Michael Kende, "The Digital Handshake", Office of Plans and Policy Working Paper Number 32, released Sept. 26, 2000, *citing Universal Service Report to Congress*, 13 FCC Rcd at 11536. The functions provided by Internet access services had been classed as a type of enhanced service well before the 1996 Act.

If Congress had intended to change that, and include pole attachments used to provide cable modem Internet services, it could and would have applied the pole attachment provisions to attachments used to provide other types of communications services, such as information services, not only cable or telecommunications services. In fact, the FCC recognized that Congress had adopted the Commission's prior usage, since after passage of the 1996 Act, the Commission classed Internet access as an information service, just as it had previously used the classification of enhanced service.

Some petitioners claim that cable modem should be treated as a telecommunications service, and cite in support *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000). The Ninth Circuit reasoned in *Portland* that cable modem is a telecommunications service to the extent that it transports data to the Internet. *Id.* Thus, *Portland* distinguishes Internet access from Internet services. *Id.* Although reasonable in theory, the FCC has already rejected this rationale in its *Universal Service Report to Congress*. The FCC explained that telecommunications service and information services are "mutually exclusive", and that "a single entity can be both a telecommunications provider and an information services provider, but only in connection with its offering of separate services; it cannot gain that dual status merely as a result of its offering of a single service." *Universal Service Report to Congress*, 13 FCC Rcd at 11,501, 11,520, n. 77.

For the first time, some petitioners also raise Section 706 of the 1996 Act as alternative grounds for regulating pole attachments used to provide Internet services. Section 706

directs the FCC to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by . . . regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note. The authority provided by Section 706 requires the FCC to initiate a notice of inquiry concerning the availability of advanced telecommunications capability. If the Commission finds that deployment is not reasonable and timely, it must take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications markets. *Id.*

The FCC has conducted two inquiries, and both times has concluded that the deployment of advanced telecommunications is reasonable and timely. As such, it has never exercised its authority, let alone identified pole attachments as a barrier to infrastructure investment. It is also doubtful that Congress intended the general authority of Section 706 to subsume the specific authority conferred elsewhere in the Communications Act, particularly within Section 224, which has always been "strictly circumscribed" and independent from the FCC's general authority in Section 2(a). *See* S. Rep. No. 95-580 at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123 (explaining that "the provision of pole space was not considered 'wire or radio communications' per se or that poles constitute 'instrumentalities, facilities, apparatus,' et cetera incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. §153(a))"). In any event, the application of Section 706 to Section 224 is a matter that need not be addressed to resolve the questions presented to the Court.

It is also clear that Section 224 was never intended to apply to attachments for wireless communications equipment. Central to the "basic design" of Section 224 was the jurisdictional nexus established by the provision of pole space

for wire communications. S. Rep. No. 95-580 at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123. As such, Section 224(a) defines a utility as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, *for any wire communications*." 47 U.S.C. § 224(a)(1) (emphasis added). That the statute reaches only wire attachments is further evidenced by the statutory definition of "usable space" as the space above the minimum grade level that can be used for the attachment of wire, cables and associated equipment. 47 U.S.C. § 224(d)(2).

The FCC focuses exclusively upon Section 224(a)(4), but it overlooks the fact that even that provision was intended to mean "the attachment *of the cables* of a CATV system to a pole or occupation of a duct or conduit or other right-of-way owned or controlled by a utility." S. Rep. No. 95-580 at 26, *reprinted in* U.S.C.C.A.N. at 134 (emphasis added). Moreover, the FCC's reliance on Section 224(a)(4) alone is unreasonable, because such a reading would conflict with Section 224(a)(5) by defining pole attachments as "any attachment by a . . . provider of telecommunications service," including an incumbent local exchange carrier. *See* 47 U.S.C. §§224(a)(4) and (a)(5). This vindicates the conclusion of the Eleventh Circuit that sections 224(a)(4) and 224(a)(1) must be "read in combination . . . to give the FCC authority to regulate attachments to poles, used at least in part, for wire communications, and by negative implication does not give the FCC authority over attachments to poles for wireless communications." *Gulf Power II*, 208 F.3d at 1274.

Nor would regulating pole attachments for wireless communications equipment be consistent with the purpose of the statute. Congress sought to counter the "superior bargaining position" that utilities allegedly held "[d]ue to the local monopoly in ownership or control of poles to which cable system operators, out of necessity or business convenience,

must attach their distribution facilities." S. Rep. No. 95-580 at 13, *reprinted in* 1978 U.S.C.C.A.N. at 121. "To prevent the power companies from taking unfair advantage of their bottleneck facilities in this manner, Congress brought them under the FCC's regulatory umbrella." *Gulf Power II*, 208 F.3d at 1274. The Eleventh Circuit recognized that "poles are not bottleneck facilities for wireless carriers," because "most of [the] equipment can be placed on any tall building," and "wireless systems operate in a completely different way than do wireline systems," by "transmit[ing] through a series of concentric circle emissions that allow the network to continue working if one antenna malfunctions." *Id.* Linear utility rights-of-way are simply irrelevant to the needs of wireless carriers. As such, a right of access for wireless attachments is unnecessary and would contravene the legislative purpose.

Finally, the structure of the 1996 Act also precludes interpreting Section 224 to regulate attachments for wireless communications equipment. The 1996 Act amendments to Section 224 immediately precede a separate provision in the 1996 Act entitled "National Wireless Telecommunications Siting Policy." See Section 704(a) of the 1996 Act (codified at 47 U.S.C. § 332(c)(7)(A) (Supp. II 1996). This provision specifically preserves local zoning authority over the "regulation of the placement, construction and modification of personal wireless service facilities." *Id.* It would contradict the preservation of local zoning authority in Section 704, if Congress had intended a federal right of access for wireless pole attachments to apply in Section 703.

ARGUMENT

I. POLE ATTACHMENTS BY CABLE TELEVISION SYSTEMS THAT ARE USED TO PROVIDE INTERNET ACCESS FALL OUTSIDE THE SCOPE OF SECTION 224.

A. Section 224 Applies Only to Attachments Used to Provide Cable Service or Telecommunications Service.

Although an agency interpretation of an ambiguous or silent statute is entitled to deference, when the statute clearly addresses the issue at hand that is the end of the matter. *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-843 (1984). Moreover, on a matter of pure statutory construction, the courts must determine congressional intent using traditional tools of statutory construction. *NLRB v. United Food and Commercial Workers Union Local 23*, 484 U.S. 112, 123 (1987). If the court finds that the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what is clear, no such deference is due. *See Whitman v. American Trucking Ass'ns.*, 121 S. Ct. 903, 917 (2001), *citing AT&T Corp. v. Iowa Utils. Bd.* 525 U.S. 366, 392 (1999).

Section 224 provides that utilities must provide nondiscriminatory access for pole attachments at rates, terms and conditions that are "just and reasonable". Just and reasonable rates apply only for attachments used by a cable television system to provide solely cable services or by a telecommunications carrier to provide telecommunications services. 47 U.S.C. §§ 224(d)-(e). Although pole attachments include "any attachment by a cable television system or provider of telecommunications service," this definition cannot possibly be the sole touchstone for the FCC's authority. 47 U.S.C. § 224(a)(4). While an ILEC certainly is a "provider of telecommunications service", it is

not entitled to pole attachments, because it is not a telecommunications carrier for purposes of Section 224. 47 U.S.C. § 224(a)(5). Therefore, the FCC's construction of Section 224 is inherently flawed, because it is plain that Section 224(a)(4) includes pole attachments to which the general authority of Section 224(b)(1) never applied. *Report and Order*, 13 FCC Rcd at 6795-6796, *See also* Gov't. Br. at 15.

Meanwhile, "the straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates . . . for cable television systems providing solely cable service and . . . for telecommunications carriers providing telecommunications service." *Gulf Power II*, 208 F.3d at 1276, n.29. Not only are these the only rates authorized, but they "narrow (b)(1)'s general mandate to set just and reasonable rates" and (f)(1)'s mandate to provide nondiscriminatory access. *Id; but see* Gov't Br. at 19 *and* Brief of Petitioner at 35-39. Under this reading, a utility must provide—at rates, terms and conditions that are just and reasonable—any attachment to a pole, duct, conduit or right of way that it owns or controls that is used by a cable television system solely to provide cable service or used by telecommunications carriers to provide telecommunications services. Hence, this construction gives meaning to Section 224 as a whole rather than focusing on isolated words or phrases. *See e.g. United States v. Morton*, 467 U.S. 822, 828 (1984)("We do not, however, construe statutory phrases in isolation; we read statutes as a whole.")

B. Cable Modem Service is Neither a Cable Service Nor a Telecommunications Service.

The FCC disregards the unambiguous language of the 1996 Act when it asserts that Internet service provided by a cable television system is either solely cable service or is subject to regulation under section 224(b)(1)'s mandate to ensure that the rates, terms, and conditions for pole attachments are just

and reasonable. *Gulf Power II*, 208 F. 3d at 1276. Cable modem Internet access is certainly not solely cable service as specified in Section 224(d)(3), nor should Section 224(e) necessarily apply, simply because Internet access services may include a telecommunications component.

Congress understood the distinction between basic and enhanced services, and codified it by classifying "telecommunications services" separate from "information services". *Compare* 47 U.S.C. 153(46) *with* 47 U.S.C. 153(20). That these classes were codified in the 1996 Act supports the conclusion that Congress did not mean for Section 224(e) to apply to attachments used to provide Internet services. It is doubtful that Congress overlooked an entire class of services when it amended Section 224. As such, Section 224 must be construed only to apply to attachments by a cable television system for solely cable service or by a telecommunications carrier for telecommunications service.

Although the Ninth Circuit has recently arrived at the novel conclusion that Internet services provided by a cable television system are telecommunications services for jurisdictional purposes of state and local franchise regulation, that says nothing about congressional intent in regards to Sections 224(d) and (e). Absent a contrary indication, congressional intent is manifested by the ordinary and common sense meaning of the express terms of the statute. *Park' N Fly, Inc. v. Dollar Park & Fly, Inc.*, 169 U.S. 189, 194 (1984). As such, this court should not apply the novel theory that Congress might have considered cable modem service to be a telecommunications service within the meaning of Section 224(e)(1).

Certainly, the FCC has remained coy on the precise classification of cable modem services, but it has generally concluded that Internet access services are "appropriately classed as information, not telecommunications, services." *Universal Service Report to Congress*, 13 FCC Rcd at 11536-

57, *but see Id.* at 11535, n. 140 (noting that "[w]e express no view in this Report on the applicability of this analysis to cable operators providing Internet access service.") Moreover, it has determined that cable modem service does not provide video programming for purposes of Section 612 of the Communications Act, 47 U.S.C. § 532. *In re Internet Ventures, Inc.*, Memorandum Opinion and Order, File No. CSR-5407-L, 15 F.C.C. Rcd 3247, at ¶ 12-13 (Feb. 18, 2000). Nor may the FCC reasonably conclude that Congress clearly intended to include cable modem service as a form of subscriber interaction when it amended Section 602(6) to apply to the selection "or use" of video programming or other programming service. *See* Section 301(a) of the 1996 Act (codified at 47 U.S.C. §522(6)(B)). *See also Gulf Power II*, 208 F.3d at 1276, *citing*, H. Rep. No. 104-204, at 97, *reprinted in* 1996 U.S.C.C.A.N. at 64. Absent a contrary indication, Section 224 may not reasonably apply to attachments used by a cable television system to provide cable modem service.

C. Excluding Attachments for Cable Modem Service is Entirely Consistent with the Purpose of Section 224 and the 1996 Act.

In a desperate appeal, petitioners argue that Congress could not have intended to penalize cable television systems by excluding attachments for cable modem service. *See* Petitioners Br. at 32; *and see* Gov't. Br. at 20. There are two fallacies bound together within this argument: that the policy goals embodied in Section 706, 47 U.S.C. § 157, statutory note, supplement the authority within Section 224 and that Congress did not mean to place cable television systems at a competitive disadvantage with telecommunications carriers for providing Internet access.

As illustrated by the 1977 Senate Report, the narrow authority within Section 224 has always been "strictly circumscribed" and independent from the FCC's general

authority in Section 2(a). *See* S. Rep. No. 95-580 at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123 (explaining that the provision of pole space was not considered "wire or radio communications" per se or that poles constitute "instrumentalities, facilities, apparatus," et cetera incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. §153(a)). *But see* Petitioners Br. at 34-35. Nothing in the 1996 Act or its legislative history evinces a contrary intent from that expressed by the framers of Section 224.

Section 706 entitled, "Advanced Telecommunications Incentives" advocates the same "deregulatory, pro-competitive" approach as the 1996 Act. *See* S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996). Section 706(a), 47 U.S.C. § 157, statutory note (a), generally directs the FCC to "encourage the deployment of advanced telecommunications capability . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." *Id.* Section 706(b) requires the FCC to conduct inquiries concerning the availability of advanced telecommunications capability, . . . [and to] determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." 47 U.S.C. 157, statutory note (b). If deployment is not reasonable and timely, it is required to take immediate action by removing barriers to infrastructure investment and promoting competition. *Id.* Thus, Section 706 relies on market forces and calls for FCC action, if, and only if, deployment of advanced telecommunications is not reasonable and timely. *Id.*

The general authority conferred through Section 706 says nothing about its effect on the specific authority conferred elsewhere in the Act. Moreover, "[i]t is a basic principle of statutory construction that a statute dealing with a narrow,

precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), *quoting Morton v. Mancari*, 417 U.S. 535, 550-551 (1974). Thus, as a mater of statutory construction, the general authority of Section 706 should not control "the narrow, precise and specific subject" of pole attachments.

The FCC has conducted only two inquiries pursuant to Section 706, both of which have found that deployment is reasonable and timely. See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, CC Docket No. 98-146, 14 FCC Rcd 2398 (1999); *and see* Second Report, 15 FCC Rcd 20913 (2000). Even if Section 706 did control the authority within Section 224, the FCC has never found that deployment is not reasonable and timely, much less that pole attachments are a barrier to infrastructure investment. Hence, the FCC lacks the requisite authority to act pursuant to Section 706.

Alternatively, petitioners couch their arguments in equity, claiming that excluding attachments used to provide cable modem service would unfairly penalize cable television systems that provide Internet access by placing them at a competitive disadvantage with telecommunications providers that provide a similar service. *See* Petitioners Br. at 32; *and see* Gov't Br. at 20. However, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that cold provide a rational basis for

the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Moreover, "'the Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted.'" *Id., quoting Vance v. Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted).

Congress could have decided to treat all attachments by cable television systems and telecommunications carriers the same, but it did not. Instead, it gave cable television systems a more favorable rate for attachments used solely to provide cable service. *Compare* 47 U.S.C. § 224(d)(1) *with* 47 U.S.C. § 224(e)(2). That cable television systems now find themselves on the wrong side of the dividing line when they make attachments that are used to provide cable modem service is a consequence of the decision made by Congress to encourage pole attachments for some services more than others, and for other services not at all. Moreover, cable television systems still enjoy exclusive rights to access "public rights-of-way and through easements ... which have been dedicated for compatible uses." 47 U.S.C. § 541(a)(2). As such, petitioners' equity arguments ring hollow.

II. SECTION 224 DOES NOT APPLY TO ATTACHMENTS OF WIRELESS TELECOMMUNICATIONS EQUIPMENT

It is also clear that Congress did not intend that Section 224 apply to attachments for wireless communications equipment. This conclusion emanates not only from the negative implication of the jurisdictional grant of Section 224(a)(1), but also from other references within the statute, as well as the legislative history, the purpose of the Pole Attachment Act and the structure of the 1996 Act as a whole.

A. Jurisdiction

Section 224(a)(1) establishes the jurisdictional nexus over utilities for the regulation of pole attachments. A utility is only subject to the jurisdiction of the FCC to the extent that is a "local exchange carrier or an electric, gas, water, steam, or other public utility," and it "owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, *for any wire communications*." 47 U.S.C. § 224(a)(1) (emphasis added). Just as reference to wireless communications equipment is clearly excluded from the definition of facilities subject to the statute, so should it be held as excluded from the application of the statute.

B. Other Provisions Within Section 224.

Section 224(d)(1) defines the just and reasonable rate for pole attachments used by a cable television system solely to provide cable service. Such rates are determined based on the amount of pole, duct, conduit or right-of-way space used. 47 U.S.C. § 224(d)(1). Subsection (2) defines the term "usable space" as the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment. 47 U.S.C. § 224(d)(2). The language used in both subsections does not either address or lend itself to wireless communications systems, indicating that inclusion of wireless communications equipment was not contemplated.

C. Legislative History

As discussed, *supra*, Congress strictly circumscribed the authority within Section 224 to the extent necessary to accomplish its "basic design" in the "most direct and least intrusive manner." S. Rep. No. 95-580 at 580, *reprinted in* 1978 U.S.C.C.A.N. at 123. "Even in this instance [the Pole Attachment Act] does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements." *Id.*

Moreover, the section-by-section analysis of the 1977 Senate Report, states that "[t]he term 'pole attachment' is defined to mean the attachment *of the cables* of a CATV system to a pole or occupation of a duct or conduit, or other right-of-way owned or controlled by a utility." S. Rep. No. 95-580 at 26, *reprinted* in 1978 U.S.C.C.A.N. at 134. This clearly reveals that Congress did not intend to cover wireless communications equipment.

D. Purpose of the Statute

The Pole Attachment Act was designed to remedy the "superior bargaining position" that various utilities were believed to enjoy over CATV systems "[d]ue to the local monopoly in ownership or control of poles to which cable system operators, out of necessity or business convenience, must attach their distribution facilities." S. Rep. No. 95-580 at 13, *reprinted in* 1978 U.S.C.C.A.N. at 121. "To prevent the power companies from taking unfair advantage of their bottleneck facilities in this manner, Congress brought them under the FCC's regulatory umbrella." *Gulf Power II*, 208 F.3d at 1274.

As the Eleventh Circuit recognized, "poles are not bottleneck facilities for wireless carriers," because "most of [the] equipment can be placed on any tall building," and "wireless systems operate in a completely different way than do wireline systems. *Id.* In fact, wireless communications equipment can be and is placed on buildings, antenna towers, water towers, even streetlight poles, depending on the wireless service to be offered. The provision of wireless siting facilities has become a competitive industry within the larger telecommunications industry, with rates robustly market-based. This is demonstrated by the federal government's own vigorous participation in that market including its demand for full market rates. GSA Bulletin FPMR D-242, 62 Fed.Reg. 32,611 (June 16, 1997) (*extended*, 64 Fed.Reg. 30,523 [June 8, 1999]); GSA Bulletin FPMR D-246, 63 Fed.Reg. 10,631

(Mar. 4, 1998) (*extended*, 64 Fed.Reg. 30,523 [June 8, 1999]). No Congressional protection is needed to assure access to siting facilities for wireless carriers.

When Section 224 was expanded to apply to pole attachments by telecommunications carriers, the express purpose was the same—to allow wireline telecommunications service providers, like the cable television companies before them, to attach to the utilities' bottleneck facilities without having to pay monopoly rents. *See Gulf Power II*, 208 F.3d at 1275, *citing* H. Rep. No. 104-204, at 92 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58. Such providers generally employ fiber-optic cable to carry telecommunications services, and as such, can make use of utility infrastructure in a manner similar to cable television systems.

E. The Structure of the 1996 Act as a Whole

Section 224 was amended by Section 703 of the 1996 Act. The first provision of the next section, Section 704, is entitled "National Wireless Telecommunications Siting Policy" and immediately preserves "the authority of State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." Section 704(a)(7)(A) of the 1996 Act (codified at 47 U.S.C. §332(c)(7)(A)). Section 704 goes on to express Congressional intent with regard to the wireless communications equipment siting. No reference is made to the previous section, nor to Section 224. Moreover, Congress's clear intent to protect municipal zoning authority would be nullified should the previous Section of the 1996 Act provide a mandatory right of access to utility infrastructure for wireless communications equipment "attachments."

For all of the above reasons, Section 224 manifestly does not apply to wireless communications equipment; the decision of the Eleventh Circuit should be upheld.

CONCLUSION

This is not a case involving a question of broad Congressional policy as interpreted by an expert agency. Rather, it is a case involving an agency's misapplication of limited, clear legislative language and intent. Congress only saw fit to provide a right of access at just and reasonable rates for pole attachments used by cable television systems to provide solely cable service and by telecommunications carriers to provide telecommunications services. 47 U.S.C. §§ 224(d)-(e). Similarly, it only contemplated the use of utility poles, ducts, conduit and other rights-of-way for communications by wire. 47 U.S.C. § 224(a)(1) *and see* S. Rep. No. 580 at 26, *reprinted in* 1978 U.S.C.C.A.N. at 134. Hence, neither wireless communications equipment nor cable modem service is entitled to regulated rates for pole attachments.

Congress made clear in 1996 that pole attachments need only be provided for non-ILEC services. The 1978 Pole Attachment Act had defined pole attachments as any attachment by a cable television system, misleading the D.C. Circuit and the FCC to conclude that cable television systems could use pole attachments for any service. *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d at 936. The 1996 Act amendments instead emphasized the services that must be provided by pole attachments, eliminating the ambiguity that had permitted an expansive interpretation of pole attachments based upon Section 224(a)(4) alone. *See Gulf Power II*, 208 F.3d at 1277.

That Section 224(a)(4) may not be read in isolation after 1996 is made plain by Section 224(a)(5), which was designed to prohibit ILECs from obtaining regulated access and rates for pole attachments. 47 U.S.C. § 224(a)(5). If Section 224(a)(4) could be read in isolation, ILECs could obtain regulated access for pole attachments at either the applicable rate for cable or telecommunications services. (As absurd as

this result might sound, it is only one step removed from the reality, whereby AT&T could enjoy the cable rate for pole attachments that are used to provide Internet telephony.)[9] Instead, Congress added Section 224(d)(3) and Section 224(e) to clarify that regulated rates apply only to cable or telecommunications *services* provided by a cable television system or a telecommunications carrier, which is not an ILEC according to Section 224(a)(5).

While it may be laudable to promote and expand the provision and even the nature of Internet service, it is beyond the scope of Section 224 to make electric utilities and their ratepayers bear the cost. *See generally Texas Power & Light Co. v. FCC*, 784 F.2d 1265 (5th Cir. 1986)(vacating FCC decision excluding costs of obtaining rights-of-way); *Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1984)(holding FCC improperly excluded non-cable related costs including guys and anchors); *but see In the Matter of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, 15 FCC Rcd 6453, 6475-76 and 6484-85 (2000) (excluding certain FERC accounts from pole attachment rate formula, "even if they include some capital expense incurred with respect to all electric power distribution plant.") In the 1996 Act, Congress addressed Internet services only to express its intent that such services remain "unfettered by Federal or State regulation." Pub. L. No. 104-104, Tit. V, § 509, 110 Stat. 138 (47 U.S.C. § 230(b)(2)(Supp. IV 1998)). Moreover, it clearly expressed its intent contrary to providing pole attachments for wireless

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[9] *See generally* Jason Oxman, *The FCC and the Unregulation of the Internet*, 1999 FCC Lexis 3370 at 53-57, citing *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, FCC No. 99-24 (rel. Feb. 18, 1999) (advocating that the FCC should continue to resist imposing the panoply of common carrier regulations (including access charges and universal service) on cable Internet services, such as Road runner and @Home provided by AT&T).

communications equipment, when it expressly preserved local and state jurisdiction over the siting of personal wireless facilities. *See* Section 704 of the 1996 Act (codified at 47 U.S.C. § 332(c)(7)(A)). Moreover, nowhere did Congress evince any intent to invade, more than the absolute minimum necessary, state regulation of the facilities used for retail, "distribution" electric services. Therefore, the FCC must not enlarge its own jurisdiction in order to promote what it views as a beneficial telecommunication policy by regulating pole attachments for wireless equipment and cable modem services.

The FCC's actions are especially egregious in light of the issues and changes facing the electric utility industry today. Agencies, especially those with little or no expertise in the area, must not interfere with critical infrastructure over which they have expressly limited jurisdiction. For all of the above reasons, we respectfully urge this Court to affirm the decision below.

Respectfully submitted,

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